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No. 86-815 (2)

In the Supreme Court of the United States

October Term, 1986

JOHN F. DUFFY, Petitioner,

v.

JUDITH A. WARD.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I. STATEMENT OF THE CASE

Respondent agrees with Petitioner's statement of the case. (Petition, pp. 3-4.)

II. FACTS

On May 30, 1981, respondent Judith Ward was arrested for the misdemeanor of interfering with a police officer (specifically, refusing to sign a traffic

citation). She was taken to the county's women's detention facility. A state statute (Calif. Penal Code, [former] sec. 853.6, subd. (i)) required that at the time any person arrested for a misdemeanor was received at a detention facility, an "immediate investigation" was to be made into whether the person would be released on a promise to appear ("O. R. release"). In fact, respondent was obviously eligible for immediate release and she was released O.R. very shortly after her arrival.

However, as a matter of policy the Sheriff, petitioner Duffy, did not enforce sec. 853.6(i). Rather than calling for an immediate investigation of the arrestee's eligibility for O.R. release, his policy called for an immediate strip search[1] of all arrestees, as though all arrested persons were a security threat and would necessarily be placed in the general jail population. Accordingly, respondent was forced to submit to a strip search.

III. CERTIORARI SHOULD NOT BE GRANTED TO REVIEW QUALIFIED IMMUNITY DOCTRINE

A. Introduction

Petitioner-defendant Duffy frames the issue as whether the Ninth Circuit has committed "a stunning 'reversal' of *Harlow* [v. *Fitzgerald*, 457 U.S. 800 (1982)]." (Petition for Cert., at p. 8.)

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[1] Specifically, the policy required the person to strip naked, bend over, and expose his/her genital and anal areas (as well as the rest of his/her body) to visual inspection.

Instead, petitioner seeks a stunning revision of civil rights immunity law. He argues for a rule of effective absolute immunity in the very large class of civil rights cases where there is no controlling case directly on point (i.e. involving essentially identical facts).

B. Doctrine

It is the major thesis of qualified immunity doctrine that unless he has violated "clearly established...rights," an official is immune. (*Harlow* v. *Fitzgerald*, *supra*, 457 U.S. at p. 818.) In several cases this court has alluded to an obvious corollary of the major thesis: where there happens to be no controlling case directly on point (i.e., involving essentially identical facts), resolution of the immunity issue turns on the general state of the law in that issue area.

In its clearest pronouncement on this point to date, in *Mitchell* v. *Forsyth*, 472 U.S. ___, ___, 86 L.Ed.2d 411, 431, fn. 12 (1985), this Court said: "We do not intend to suggest that an official is always immune from liability or suit for a warrantless search merely because the warrant requirement has never explicitly been held to apply to a search conducted in identical circumstances."

In various ways the court has alluded to this corollary in several other cases. (See, e.g., *Malley* v. *Briggs*, 475 U.S. ___, ___, 89 L.Ed. 2d 271, 278-281 (1986); *Davis* v. *Scherer*, 468 U.S. 183, 195 (1984); *Harlow* v. *Fitzgerald*, *supra*, 457 U.S. at p. 819.)

Indeed, this corollary is obvious -- inescapable, if the court is not to shrink the coverage of 42 U.S.C. sec. 1983 drastically by judicial manipulation of a rule which (after all) does not even appear in the text of sec. 1983.

Not surprisingly, the courts that have squarely faced the question of how to determine whether the law was "clearly established" in the absence of absolutely controlling case authority always seem to hold that a further inquiry into the state of the law is required (and not, as petitioner would have it, that the immunity question resolves automatically in the defendant's favor). (See, e.g., *Blackburn* v. *Snow* 771 F.2d 556, 570 (1st Cir. 1985); *Acoff* v. *Abston* (11th Cir. 1985) 762 F.2d 1543, 1547-1550; *Capoeman* v. *Reed* (9th Cir. 1985) 754 F.2d 1512, 1514-1515; *Bilbrey* v. *Brown* 738 F.2d 1462, 1465-1466 (9th Cir. 1984); *McGee* v. *Hester* (8th Cir. 1983) 724 F.2d 89, 91-92; *Doe* v. *Renfrew* 631 F.2d 91, 92-93 (7th Cir. 1980)[2]; see also, *B.C.R. Transport Co., Inc.* v. *Fontaine* (1st Cir. 1984) 727 F.2d 7, 10-11; *McCann* v. *Coughlin* (2d Cir. 1983) 698 F.2d 112, 125; and see *Lucas* v. *Hodges* (D.C. Cir 1984) 730 F.2d 1493, 1507 (vacated, 738 F.2d 1392).)

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[2] In the setting of a warrantless strip search, the *Doe* court reasoned: "Apart from any constitutional readings and rulings, simple common sense would indicate that the conduct of the school officials in permitting such a nude search was not only unlawful but outrageous under 'settled indisputable principles of law'" (quoting *Wood* v. *Strickland*, 420 U.S. 308, 321 (1975)).

To summarize, in the universe of cases where there is no directly controlling authority on identical facts -- a very large universe indeed-- there is and there should be no rule of automatic immunity, as petitioner would have it. There is instead a second level of inquiry, concerning the *legal reasonableness* of the defendant's conduct. Was it "objective[ly] legal[ly] reasonable[]" (*Harlow* v. *Fitzgerald*, *supra*, 457 U.S. at p. 819)? Could he have been "expected to know" (id.) the contours of the plaintiffs' rights? In short, is this an "unjustified lawsuit" (*Davis* v. *Scherer*, *supra*, 468 U.S. at p. 195)?

The Ninth Circuit faced this problem in *Capoeman* v. *Reed*, *supra*, 754 F.2d 1512. It is a soundly reasoned decision, entirely in line with this Court's qualified immunity cases.

The issue in *Capoeman* was whether it was clearly established in 1981 that prisoners have the right on religious grounds to resist haircuts. The court concluded that it was not, and affirmed a defendant's summary judgment on immunity grounds.

Stating the applicable rule the court said: "[I]n the absence of binding precedent, a court should look to whatever decisional law is available to ascertain whether the law is clearly established . . .." (754 F.2d at p. 1514.)

Capoeman is entirely consistent with this Court's decisions on the issue of qualified immunity. And the Ninth Circuit's decision in this case is entirely consistent with *Capoeman*. All the circuit court did was to determine that the objective

criteria, that is, the actual facts of the case and the relevant doctrine and case law, proved sufficient to establish clearly that respondent had a right not to be treated as petitioner treated her.

C. The Doctrine As Applied

The foregoing establishes that there is nothing doctrinally unsound or incorrect about the Ninth Circuit's opinion. For that reason alone, the petition for certiorari should be denied. It is a matter of much less concern to this Court when the right doctrine has yielded an arguably undesirable result than when the lower courts are misinterpreting the doctrine.

But on that other level it is clear that the Ninth Circuit's *result* is correct under the controlling law, and there is no call or need for clarification by this Court. No other result could obtain, on these facts, without a major judicial revision of civil rights immunity doctrine.

Respondent was searched under a *blanket policy* according to which "all persons received on criminal charges" (Declaration of Clifford R. Powell, Excerpt of the Record filed Oct. 20, 1983, p. 90, line 20-21) were strip searched. No justification was offered for the policy in petitioner's moving papers or in the hearing below, other than the truism that respondent was "received on criminal charges."

Thus, the *fact* here is that respondent was stripped naked and every square inch of her body was carefully searched, without the slightest

consideration of the likelihood that she might be in possession of a concealed weapon or of contraband, without any consideration for whether she might pose a security risk to the institution where she was so briefly held.[3] There was no inquiry of any kind into specific facts that might justify a search.

Let it be assumed that there was no meaningful case law, at that time, on strip searches of persons arrested on minor charges.[4] Still, there remained the question whether it was clearly established that a search of a most demeaning, embarrassing, intrusive nature, without a warrant and without cause to believe something was secreted on the person, without any reason to be concerned about the security of the jail, was unconstitutional.

Although there was no absolutely controlling case law on identical facts, there was *relevant* and *persuasive* case law which solidly established that this strip search, under these circumstances, was

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[3] It bears repeating that once some inquiry was made respondent was found clearly eligible for O.R. release, i.e., not a candidate for inclusion in the jail population, and that she was in fact released on O.R. and never intermingled with the population.

[4] This is not really true, of course. See *Tinetti* v. *Wittke*, 479 F.Supp. 486 (E.D. Wis. 1979), *affd.*, 620 F.2d 160 (7th Cir. 1980). The one more or less identical case existing at the time held that such searches were and are unconstitutional, as the circuit court correctly noted in its opinion below.

unconstitutional. Petitioner had to look no farther than this Court's opinion in *Bell* v. *Wolfish*, 441 U.S. 520 (1979).

One issue in *Bell* was the constitutionality of a policy by which pretrial detainees were strip searched after all contact visits. In holding the practice constitutional, the Court said: "Admittedly, this practice instinctively gives us the most pause. * * * The Fourth Amendment prohibits only unreasonable searches [citation] and under the circumstances, we do not believe that these searches are unreasonable. [*para.*] The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails." (441 U.S. at pp. 558-559.)

The Court proceeded to recount the "unique" and "serious" security problems characteristic of detention facilities. While "not underestimat[ing] the degree to which these searches may invade the personal privacy of inmates" (*id.* at p. 560), the Court concluded that on balance "the significant and legitimate security interests of the institution" (*id.*) were sufficiently weighty to justify the searches after contact visits.

It could not be clearer that in the case of the strip search of respondent, the balance tips sharply the other way. The value of the "invasion of personal rights" was essentially the same as in *Bell*, while "the need for the particular search," which *Bell* requires to be balanced against that substantial

personal interest, sums to zero, nothing. There was *no* justification of any kind for the strip search. There was *no* suspicion that respondent was carrying a weapon or contraband, and *no* prospect that she would mingle with the jail population.

On the facts, it could not have been clearer, on the day of the search in this case, that the law did not permit this search.

IV. CERTIORARI SHOULD NOT BE GRANTED TO REVIEW THE CIRCUIT COURT'S ANALYSIS OF THE TERMS OF A COLLATERAL JUDGMENT

Petitioner makes a second, minor argument that the Ninth Circuit erred in denying him immunity for assertedly having relied upon a state court trial level decision in another case (styled *Hudler* v. *Duffy*, see petition, part II, pp. 10-11.) He offers no reason why this utterly unique and mundane issue should concern the Supreme Court of the United States. Moreover, absolutely nothing is brought before this Court to demonstrate the scope of the issues in *Hudler* or to show the order in question. The Court is asked simply to believe petitioner's assertions about it.

Parts of the *Hudler* file, at least, were before the Ninth Circuit, and that court dispatched the issue summarily. The *Hudler* case, the circuit court said, concerned only custodial detainees, a class of persons as to whom strip search principles are entirely different than they are for persons like respondent. The Ninth Circuit concluded that the

Hudler case was wholly irrelevant to the issues in this one.

As petitioner makes no showing of why this holding should be reversed, his second argument should be rejected summarily. The absence of any useful information about *Hudler* strongly implies that the Ninth Circuit read the record correctly and Petitioner would misinterpret it in hopes of getting the case re-heard.

V. CONCLUSION

The petition for certiorari is structured as a request for correction of an error committed by the Ninth Circuit, but in reality it is a request for a radical alteration of civil rights immunity law. No justification for this change is offered, and it seems sure that such a change would flaunt the will of Congress.

This petition should be denied.

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Respectfully submitted,

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